CLERK'S COPY.

Petition and Transcript of Record

Supreme Court of the United States

OCTOBER TERM, ~~1929~~ 1930

No. ~~625~~ 40

FAWCUS MACHINE COMPANY, PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED FEBRUARY 4, 1930

CERTIORARI GRANTED APRIL 21, 1930

(34,756)

(34,756)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 625

FAWCUS MACHINE COMPANY, PETITIONER,

vs.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 5, 1930

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 625

FAWCUS MACHINE COMPANY, a Corporation, Petitioner,

v.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF

Petition

The Fawcus Machine Company, by James S. Y. Ivins, its attorney, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered on November 4, 1929, dismissing the petition of said Fawcus Machine Company.

Question Presented

In the determination of petitioner's excess profits taxes for the calendar year 1919, should its invested capital be reduced by the amount of Federal income and excess profits taxes for the year 1918 as determined and assessed under the Revenue Act of 1918, which was a retroactive statute enacted on February 24, 1919? In other words: can a tax accrue as a liability before the enactment of the statute imposing it?

The Statute and Regulations Involved

Revenue Act of 1918, Section 326:

"(A). That as used in this title the term 'invested capital' for any year means (except as provided in subdivisions (b) and (c) of this section):

"(1) Actual cash bona fide paid in for stock or shares:

"(2) Actual cash value of tangible property, other than cash, bona fide paid in for stock or shares, * * *;

"(3) Paid-in or earned surplus and undivided profits; not including surplus and undivided profits earned during the year. * * *

"(d) The invested capital for any period shall be the average invested capital for such period * * *."

Regulations 45, Article 845:

"Surplus and Undivided Profits; Reserve for Income and Excess Profits Taxes.—For the purpose of computing invested capital federal income and war profits and excess profits taxes are deemed to have been paid out of the net income of the taxable year for which they are levied. It is immaterial, therefore, whether reserves for the payment of such taxes for the preceding year have been set up or not, or if set up whether such taxes when paid have actually been charged against such reserves. Amounts payable on account of such taxes for the preceding year may be included in the computation of invested capital only until such taxes become due and payable. A deduction from the invested capital as of the beginning of the taxable year must therefore be made for such taxes or any installment thereof, averaged for the proportionate part of the taxable year after the date when the tax or the installment is due and payable. Where as a result of an audit by the Commissioner, or the acceptance of an amended return, or for any other reason, the amount of any such tax for the preceding year is subsequently changed, a corresponding adjustment will be made in the invested capital for the taxable year upon the same basis as if the corrected amount of the tax for the preceding year had been used in the original computation of the invested capital for the taxable year. See articles 1541 and 1542."

Revenue Act of 1926, Section 1207:

"The computation of invested capital for any taxable year under the Revenue Act of 1917, the Revenue Act of 1918, and the Revenue Act of 1921, shall be considered as having been correctly made, so far as relating to the inclusion in invested capital for such year of income, war-profits, or excess-profits taxes for the preceding year, if made in accordance with the regulations in force in re-

spect of such taxable year applicable to the relationship between invested capital of one year and taxes for the preceding year."

Statement.

This case was instituted by the petitioner in the Court of Claims to recover excess profits taxes for the year 1919 alleged to have been overpaid. The Court of Claims, after finding the facts in accordance with a stipulation by the parties, dismissed the petition with the following memorandum:

"This case falls within the decision of the Supreme Court in the case of United States v. Yale & Towne Mfg. Co., 269 U. S. 422, and the following citations, viz: Nichols v. Sylvester Co., 16 Fed. (2d) 98; Bowers v. Kaufmann & Co., 18 Fed. (2d) 69; Russel Wheel and Foundry Company, 3 B. T. A. 1168. The petition is dismissed. It is so ordered."

The petitioner in March, 1920, filed its income and profits tax return for the calendar year 1919 (R. 25 ¶ II) and subsequently filed amended returns. The total amount originally paid (in various installments) was $43,119.26 (R. 25 ¶ II). The Commissioner of Internal Revenue determined the petitioner's liability for taxes for 1919 to be $41,182.77. The difference was refunded (R. 25 ¶ III). The petitioner claims that the further sum of $1,597.85 should have been refunded on the ground that the Commissioner erroneously reduced petitioner's invested capital for 1919 below the correct amount allowable under the statute.

Under the provisions of the Revenue Act of 1918, more particularly Section 326 thereof, the invested capital of a corporation includes cash and property (subject to certain limitations) paid in for stock, and paid-in or earned surplus and undivided profits, not including surplus and undivided profits earned during the year. The total taxes due from plaintiff for the year 1918 amounted to $78,784.95, which were paid in four equal installments on or about the 15th days of March, June, September, and December, 1919. Under the regulations then in force in respect of such taxable year applicable to the relationship between invested capital of one year and taxes of the preceding year the

amount of such taxes was included by the Commissioner of Internal Revenue in the invested capital of the plaintiff for the year 1919 only until the installments were actually paid, the balance being excluded. This was accomplished by determining the average deduction for the year and reducing the earned surplus on January 1, 1919, by that amount. The amount of the average deduction was $33,294.68.

During the taxable year 1919, at the time each installment of 1918 income and profits taxes of the plaintiff became due and payable, the plaintiff had on hand surplus or undivided profits, earned during the taxable year 1919, more than sufficient to pay such installment (R. 26 ¶ V).

Petitioner claims that its earned surplus for 1919 should not have been thus reduced and that the difference in taxes attributable to such erroneous reduction should be refunded.

Specification of Errors to be Urged

The Court of Claims erred in holding that the plaintiff was not entitled to recover and that the petition should be dismissed. The decision of the Court of Claims amounted to a ruling that the Commissioner of Internal Revenue acted correctly in reducing the petitioner's 1919 invested capital by the amount of its 1918 income taxes prorated from dates of payment.

Reasons for Granting the Writ.

The Court of Claims dismissed the petition before it in a summary manner, without any attempt to answer the plaintiff's contention that a tax cannot accrue as a liability prior to the enactment of the statute imposing it. On its face the decision of the Court of Claims was based upon four cases none of which involved this controlling point.

The decision of the Court of Claims is in conflict with the decisions of the Supreme Court in United States v. Woodward, 256 U. S. 632; Town of Koshkonong v. Burton, 104 U. S. 668, and other cases.

The Court of Claims in dismissing the petition below, has, it is believed, placed an improper construction on Section 326 (a) of the Revenue Act of 1918, or on Section 1207 of the Revenue Act of 1926. The decision of the Court of

Claims is being followed by the Bureau of Internal Revenue in closing all pending excess profits tax cases. A large number of such cases for the year 1919, including those of many of the largest oil companies, are still pending in the Bureau of Internal Revenue, before the Board of Tax Appeals and before the District Courts and Circuit Courts of Appeals, and in practically every one of them the question in this case is necessarily involved in a correct computation of the disputed taxes. In a large number of such cases the taxpayer's rights under this point have been saved and in many others such rights may still be saved, so that if the Supreme Court should reverse the Court of Claims, it will be possible for such taxpayers to have the decision of the Supreme Court applied in the computation of their taxes.

Wherefore it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Court of Claims should be granted.

J. S. Y. Ivins, Attorney for Petitioner. c/o Holmes, Brewster & Ivins, 815 Fifteenth Street N. W., Washington, D. C.

February, 1930.

[fols. a & 1] IN THE COURT OF CLAIMS

No. H 250

FAWCUS MACHINE COMPANY, a Corporation, Plaintiff,

against

THE UNITED STATES OF AMERICA, Defendant

1. PETITION—Filed June 14, 1927

To the Honorable the Court of Claims:

The above-named plaintiff, by Holmes, Brewster, & Ivins, its attorneys, respectfully shows:

First. The plaintiff is and at all times hereinafter mentioned was a corporation duly organized and existing under the laws of the State of Pennsylvania, now having its office and principal place of business at 2818 Smallman Street, Pittsburgh.

Second. The plaintiff has a just claim against the United States of America in the amount of $1,597.85, with interest thereon from March 15, 1920, which said claim arises in connection with the payment by the plaintiff of excess profits tax for the year 1919 as hereinafter more fully set forth.

Third. On or about the 15th day of March, 1920, pursuant to the Revenue Act of 1918, the plaintiff filed with [fol. 2] the then duly appointed, qualified and acting Collector of Internal Revenue for the 23d District of Pennsylvania, on Form 1120, its income and profits tax return for the taxable year ended December 31, 1919, accompanied by its Government contracts, profits, tax return for the same period on Form 1120-S, and subsequent thereto in June, 1921, and in January, 1922, the plaintiff filed in the same manner amended income and profits tax returns and Government contract profits tax returns for the taxable year ended December 31, 1919. The plaintiff paid tax thereon as follows: $30,328.81 in four equal installments on or about the 15th days of March, June, September and December, 1920, respectively; $4,558.94 in or about June, 1921 (accompanying first amended returns); $8,231.51 in or about January, 1922 (accompanying second amended returns); a total tax payment for the taxable year 1919 of $43,119.26.

Fourth. The Commissioner of Internal Revenue in a letter dated May 13, 1924 (copy of which is hereto annexed, marked Exhibit A, and made a part of this petition) determined the liability of the plaintiff for income and profits taxes for the taxable year 1919 to be $41,182.77. Thereafter, by his Certificate No. 673829, the Commissioner of Internal Revenue, pursuant to such determination, certified an over-assessment of $1,936.49, which amount was subsequently refunded to the plaintiff by the Collector of Internal Revenue with interest amounting to $269.07.

Fifth. Under the provisions of the Revenue Act of 1918, more particularly Section 326 thereof, the invested capital [fol. 3] of a corporation includes cash and property (subject to certain limitations) paid in for stock and paid-in or earned surplus and undivided profits, not including surplus and undivided profits earned during the year. The Com-

missioner of Internal Revenue in making his said determination reduced the petitioner's earned surplus at the beginning of the year by $33,294.68, as shown in Schedule 4 of the Commissioner's said letter (Exhibit A annexed), such reduction being on account of income and profits taxes determined by him to have been due from the plaintiff for the taxable year 1918 and payable during the taxable year 1919. Such reduction of invested capital was improper under the provisions of the Revenue Act of 1918 for the reason that such taxes for the year 1918 had not and could not have accrued during the taxable year 1918, and had not and could not have been a charge against the income of the petitioner for the year 1918. During the taxable year 1919, at the time each installment of 1918 income and profits taxes of the plaintiff became due and payable, the plaintiff had on hand surplus or undivided profits, earned during the taxable year 1919, more than sufficient to pay such installment.

Sixth. The computation of income and profits taxes of the plaintiff for the taxable year 1919 made in the Commissioner's said determination was further incorrect in the adjustment for 1917 taxes contained in Item (e) of Schedule 3, and explained in Item (e) of Schedule 4 of the Commissioner's said letter of May 13, 1924 (Exhibit A), in that the 1917 taxes, shown by said letter to have amounted to [fol 4] $94,370.96, had been erroneously computed in the same manner that the 1919 taxes were erroneously computed as alleged above, that is, through reducing the invested capital of the plaintiff for the taxable year by the amount of income taxes for the preceding year prorated from due date. In this manner, the 1917 taxes, by which the Commissioner reduced surplus in computing invested capital of the plaintiff, were overstated to the extent of $339.58.

Seventh. A proper computation of the plaintiff's income and profits taxes for 1919 indicates a tax of $39,584.92 instead of the tax of $41,182.77, determined by the Commissioner of Internal Revenue in said letter.

Eighth. Through mistake, error and inadvertence, the plaintiff paid in excess of all refunds heretofore made to it on account of 1919 taxes, the sum of $1,597.85 in excess of the taxes lawfully due and payable by it.

Ninth. That thereafter, on or about December 9, 1925, the plaintiff duly filed, with the Collector of Internal Revenue for the 23d District of Pennsylvania for transmission to the Commissioner of Internal Revenue, a claim (a copy of which is hereto annexed marked Exhibit B, and made a part of this petition) for refund of said excess tax in the amount of $1,597.85, paid as aforesaid, on the ground that the plaintiff's invested capital for the taxable year 1919, as finally adjusted in the Commissioner's letter of May 13, 1924, had been erroneously reduced by the amount of $33,294.68.

[fol. 5] Tenth. On or about December 21, 1925, the Commissioner of Internal Revenue, by a letter (a copy of which is hereto annexed, marked Exhibit C and made a part of this petition) rejected said claim for refund.

Eleventh. Under said claim for refund the plaintiff was entitled, in accordance with the provisions of Section 281 of the Revenue Act of 1924, to a refund of the excess tax amounting to $1,597.85, paid by it as aforesaid, and the rejection of said claim by the Commissioner of Internal Revenue, as aforesaid, was wrongful, illegal and unlawful.

Twelfth. That the United States of America is now wrongfully and unlawfully withholding and retaining from the plaintiff, without it- consent and against its will, the whole of said amount of $1,597.85.

Thirteenth. On February 5, 1926, the plaintiff filed in this Court a petition setting forth the foregoing facts and seeking judgment against the United States in the sum of $1,597.85, with interest and costs. In February, 1927, the attorney for the defendant moved that said case be dismissed for lack of prosecution because of failure to hear from clients on matters essential to the prosecution of such case. The attorneys indorsed "No objection" on said motion and it was granted on February 14, 1927. Such dismissal was not upon the merits, which were never considered by the Court.

Fourteenth. The plaintiff is and always has been the sole owner of the claim herein referred to and has not assigned [fol. 6] or transferred the whole or any part thereof or interest therein. It has at all times borne true allegiance to the Government of the United States and has not in any

way aided, abetted or given encouragement to rebellion against the said Government. It believes the facts as stated herein to be true and that it is justly entitled to the amount claimed from the United States after allowing all just credits and off-sets.

Wherefore, the premises considered, the plaintiff prays for judgment against the United States of America in the sum of $1,597.85, with interest thereon from the fifteenth day of March, 1920, and its costs herein.

Fawcus Machine Company, by Holmes, Brewster & Ivins, Attorneys for Plaintiff, 815 Fifteenth Street N. W., Washington, D. C.

Duly sworn to by James S. Y. Ivins. Jurat omitted in printing.

[fol. 7] EXHIBIT A TO PETITION

Copy

Treasury Department, Washington

May 13, 1924.

IT:CR:A. AH.

Fawcus Machine Company, 1606 First National Bank Building, Pittsburgh, Pennsylvania.

SIRS: An examination of your income tax return together with the information heretofore submitted has been made, and the results thereof are outlined in the attached schedules.

In accordance with the provisions of Section 250 (d) of the Revenue Act of 1921, you are granted thirty days within which to file an appeal and to show cause or reason why this tax or deficiency should not be paid. The appeal, if filed, must be addressed to the Commissioner of Internal Revenue, Washington, D. C., for the specific attention of IT:CR:A-AH.

Treasury Decision No. 3492, setting forth the privileges of taxpayers in cases of appeal, is attached for your information and guidance.

Where a taxpayer has been given an opportunity to appeal and has not done so, as set forth above, and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement of the assessment will be entertained. This assessment is in addition to all other outstanding and unpaid assessments appearing upon the Collector's lists.

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

Respectfully, J. G. Bright, Deputy Commissioner, by L. T. Lohmann, Head of Division.

Inclosure: T. D. 3492, Schedules 1 to 10, inc., Statement.

[fol. 8] Copy

IT:CR:A. AH.

Statement of Returns Examined and Resulting Tax Liability

Company.	Year.	Form.
Fawcus Machine Company	1919	1120

Resulting Tax Liability

Name of Company.	Year.	Over-assessment.
Fawcus Machine Company	1919	$1,936.49

Bureau letter dated October 29, 1923, has been made the basis of the adjustments which are fully explained in the attached Schedules 1 to 10, inclusive.

The adjustments contained in the accompanying schedules are in accordance with the agreement reached in the conference held November 16, 1923, the income of $162,089.19, as adjusted by the Revenue Agent being accepted as the correct net income for the taxable year.

A Certificate of Overassessment will be issued through the office of the Collector of Internal Revenue for your district, and will be applied by that official in accordance with the provisions of Section 252 of the Revenue Act of 1921.

[fol. 9] Copy

Fawcus Machine Company

Year ended December 31, 1919

Schedule 1

Net Income

Net income as disclosed by Bureau letter dated October 29, 1923		$168,511 71
As corrected		162,089 19
Net deductions		$6,422 52
Additions		
(a) Depreciation account Residual Value	$12,485 17	
(b) Error in Bureau letter dated 9/11/23	02	
Total additions		12,485 19
(b) Deductions:		
(c) Depreciation disallowed in Bureau letter dated October 29, 1923	$18,907.71	
Total Deductions		18,907 71
Net deductions as above		$6,422.52

Schedule 2

Explanation of Items Changed

(a) In accordance with the agrement reached in the reference held November 16, 1923, the income of $162,089.19 as corrected by the Revenue Agent is used as the correct income. This by way of compromise only, since it has been shown that additional depreciation should be allowed on costs that had been restored to the property accounts and it was also conceded that depreciation should be disallowed on costs used as a basis for amortization allowed for 1918. [fol. 10] Accordingly, the adjustment (a) and (c) repre-

sent respectively, the restoration to income of the depreciation that has been allowed on the Residual Value of amortized costs, and the disallowance from income of the depreciation that had been restored to income in Bureau letter dated October 29, 1923.

(b) This is necessary to correct as error in computation contained in Bureau letter dated September 1, 1923, namely, the difference between $95,259.26 and $72,555.42 should be shown as $22,703.82 instead of $22,703.74.

Schedule

Consolidated Invested Capital 1919

As reported on Bureau letter dated October 29, 1923		$738,592 17
As corrected		736,470 52
Net decrease as explained below		$2,031 65
Increases:		
(a) 1918 Income Taxes adjusted	$6,586 52	
(b) Amortization Adjustment ..	40,866 48	
(c) Inadmissible Deduction	31 78	
Total increase ..		$47,484 78
Decreases:		
(d) Appreciation adjusted	$1,783 73	
(e) Adjustment for 1917 taxes	28,824 99	
(f) Depreciation adjustment	18,907 71	
Total decrease ..		49,516 43
Net decrease as above		$2,031 65

[fol. 11] Schedule 4

Explanation of Items Changed

(a) 1918 Income Taxes Adjusted:

Under Section 250, Revenue Act of 1918, income and profits taxes may be paid in quarterly installments. The

first installment becomes due and payable at the time fixed by law for filing the returns and the second, third and fourth on the 15th day of the third, sixth and ninth months, respectively, thereafter. Treasury Decision 2791 provides that amounts payable on account of such taxes may be included in invested capital only until due and payable. The taxes, therefore, are adjusted as follows:

First Installment	Second Installment	Third Installment	Fourth Installment
292/365	plus 200/365	plus 108/365	plus 17/365-617/365

617/365 divided by 4 (the number of installments) equals .4226027.

$78,784.95 multiplied by .4226027 equals the adjusted average for the year which is	$33,294 68
Deducted in Bureau letter dated October 29, 1923	39,881 20
Difference to be restored	$6,586 52

(b) Amortization:

Invested capital should be increased by the amount of disallowed amortization that had not been restored upon your books.

Total to be restored	$41,741 72
Restored upon your books	875 24
Balance to be restored	$40,866 48

[fol. 12] (c) Inadmissible Adjustment:

Percentage deduction shown in Bureau letter dated 9/11/23	000344
Invested capital before inadmissible deduction	$736,723.95
Deduction .03447 of $736,725.95	$253 43
Deduction in office letter dated Oct. 29, 1923	285 21
Difference to be restored	$31 78

(d) Appreciation Adjusted:

Appreciation correctly deducted from invested capital in office letter dated September 11, 1923	$75,965.95
Appreciation deducted in office letter dated October 29, 1923	74,182 22
Balance to be deducted	$1,783 73

(e) Adjustment for 1917 taxes:

The correct amount of 1917 income and profits taxes that are considered to have — due and payable on June 15, 1918, should be deducted from invested capital.

Corrected tax liability shown in Bureau letter dated 3 9 23	$94,370 96
Amount charged to surplus prior to 1/1/1919	74,873 24
Balance to be deducted from invested capital	$19,497 72
Increase in Invested Capital Bureau letter dated 9/11/23	9,327 27
Total to be deducted from invested capital	$28,824 99

[fol. 13] (f) Depreciation Adjustment:

Adjustment is made to invested capital for depreciation that has been allowed as a deduction.

As restored in office letter dated Sept. 11, 1923	$ 30,11643
Amount deducted in office letter dated Oct. 29, 1923	11,208.72
Balance to be deducted	$ 18,907.71

Schedule 5

Proof of Invested Capital

Capital Stock		$283,984.35
Surplus as corrected (Schedule 6)		415,682.07
Reserves for Dividends		15,706.32
Reserves for Taxes		65,220.80
Total, corrected balance sheet beginning of year		$780,593.54
Addition — Capital Stock sold — 1/18/19— $5,178.88 prorated		4,957.67
Total		$785,531.21
Reductions:		
1918 Taxes prorated	$33,294.68	
Dividend paid, prorated	15,512.58	
Inadmissible deduction	253.43	
Total (deduct from above)		49,060.69
As shown on Schedule 3		$736,470.57

[fol. 14]

Schedule 6

Analysis of Corrected Surplus

Surplus as shown by Revenue Agent		$421,974.80
Add: Depreciation restored		73,076.62
Total		$495,051.42
Less:		
Appreciation deducted by Revenue Agent	$63,350.29	
Appreciation to be deducted	75,965.95	
Difference to be deducted	$12,615.56	
Amortization allowed $48,131.31		
Allowed by Agent 875.24		
Balance to be deducted	47,256.07	
Additional 1917 taxes set up as a liability	19,497.72	
Total (deduct from above)		$ 79,369.35
Corrected surplus (as shown on Schedule 5)		$415,682.07

Schedule 7

Computation of Excess Profits and War Profits Credits

Net income taxable year (Schedule 1)	$162,089.19
Net income prewar period shown in R. A. R.	12,818.18
Invested capital taxable year (Schedule 3)	$736,470.52
Invested capital prewar period shown in R. A. R	203,501.13
Increase in invested capital for taxable year as compared with average for prewar period	$532,969.39

[fol. 15]

Excess Profits Credit

8% of invested capital for taxable year	$ 58,917.64
Exemption	3,000.00
Excess profits credit	$ 61,917.64

War Profits Credit

Average net income for prewar period	$ 12,818.18
Plus 10% of increase in invested capital as compared with average for prewar period	53,296.94
10% of invested capital for taxable year	$ 73,647.05
Exemption	3,000.00
War Profits credit	$ 78,647.05

Schedule 8

Adjustment Account Government Contracts

Amount of Government contracts	$226,302.50
Gross income from contracts	50,245.39
Total Gross income 1919 (Line A-11 of return)	$367.178.58
Add:	
Miscellaneous claims and allowances	387.98
Sale of capital assets	3,135.04
Total Gross Income	$370,701.60

Less: Dividends received	21.60
Net Gross Income	$370,680.00
Percentage that gross income from contracts is of the total gross income	.13555
Total general expenses (Lines A-20 and A-25 of return)	$212,977.31
Less: Depreciation disallowed	4,364.90
Net General Expenses	$208,612.41
[fol. 16] Gross income from Government Contracts (above)	$ 50,245.69
Less expenses applicable to Government Contracts (13.555% of $208,612.41)	28,277.41
Net income from Government Contracts	$ 21,968.28
Total Net Income (Schedule 1)	$162,089.19
Percentage that Net Income from Government Contracts is of the Total Net Income	13.55
Percentage that other income is to the total income	86.45

Schedule 9

Computation of Total Tax (1918) Rates for Government Contracts

Excess Profits Tax	Income	Tax
Net income for taxable year	$162,089.19	
Less excess profits credit	61,917.64	
Balance	$100,171.55	
Taxable at 30%	$85,376.46	$25,612.94
Taxable at 65%	14,795.09	9,616.81
	$100,171.55	$35,229.75
War Profits Tax:		
Net income for taxable year	$162,089.19	
Less war profits credit	78,647.05	

Taxable at 80%	$ 83,442.14	$ 66,753.71
Less excess profits tax		35,229.75
War profits tax		$ 31,523.96
Total excess profits and war profits tax		66,753.71
Tax applicable to Government Contracts (13.55%)		9,045.13

[fol. 17] Schedule 10

Computation of Total Tax (1919)

Excess Profits Tax	Income	Tax
Net income for taxable year	$162,089.19	
Less excess profits credit	61,917.64	
Balance	$100,171.55	
Taxable at 20%	85,376.46	$ 17,075.29
Taxable at 40%	14,795.09	5,918.04
	$100,171.55	$ 22,993.33
Applicable to income other than Gov. Contracts (86.45%)		$ 19,877.73
Tax at 1918 rates applicable to Gov. Contracts		9,045.13
Total excess and war profits tax		$ 28,922.86

Income Tax:

Net income for taxable year	$162,089.19	
Less:		
Interest on obligations of United States not exempt	$ 8,567.21	
Excess profits tax	28,922.86	
Exemption	2,000.00	
	39,490.07	
Taxable at 10%	122,599.12	$ 12,259.91
Total, excess profits, and income taxes		$ 41,182.77

Previously assessed:		
Original #403041	$ 30,328.81	
Amended Return June, 1921— #400016	4,558.94	
Amended Return Jan., 1922— #400029	8,231.51	
Total previously assessed		43,119.26
Overassessed		$ 1,936.49

[fol. 18] EXHIBIT B TO PETITION

Copy

(Execute Separate Form for each Tax Period)

Claim for

Abatement of Tax Assessed

Credit Against Outstanding Assessments

X Refund of Taxes Illegally Collected

Refund of Amounts Paid for Stamps Used in Error or Excess

STATE OF PENNSYLVANIA,
County of Allegheny, ss:

Fawcus Machine Company, 2818 Smallman Street, Pittsburgh, Pa.

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete.

Period	Year
From Jan. 1, 1919, to Dec. 31, 1919	1919

1. Business in which engaged: Machinery manufacturer.
2. Character of assessment or tax: Income and profits tax.
3. Amount of assessment or stamps purchased: $——.
4. Reduction of Tax Liability requested (Income and Profits Tax): $1,597.85.

5. Amount to be abated: $——.

6. Amount to be refunded (or such greater amount as is legally refundable) (see attached sheets): $1,597.85.

7. Dates of payment: (See Collector's receipts or indorsements of canceled checks.)

(If statement covers income tax liability, items 8-11, inclusive, must be answered.)

[fol. 19] 8. District in which return (if any) was filed: 23rd Pa.

9. District in which unpaid assessment appears: ——.

10. Amount of overpayment claimed as credit: $——.

11. Unpaid assessment against which credit is asked: period from —— to ——: $——.

Deponent verily believes that this application should be allowed for the following reasons:

The taxpayer's invested capital for the taxable year 1919, as finally adjusted in the Department's letter of May 13, 1924, was reduced by the amount of $33,294.68. This deduction represents the amount of the income taxes computed on income for the year preceding the taxable year prorated from the dates due and payable within the taxable year.

The United States Board of Tax Appeals in its decision in the Appeal of the Guaranty Construction Company, Docket Nos. 1828 and 1848, decided October 30, 1925, ruled that there is no warrant under the several Revenue Acts for requiring invested capital to be reduced for a taxable year, by income and profits taxes due and payable during the taxable year on account of taxes for the preceding year; and in effect held that Article 845 of Regulations 45 and Article 845 of Regulations 62 are invalid.

(Signed) Thomas J. Haley, Treasurer. (Seal.)

Sworn to and subscribed before me this 9th day of December, 1925. R. W. Combs, Notary Public. My commission expires at next Session of Senate. (Seal.)

[fol. 20] 1919

Taxable Net Income (A-2 letter May 13, 1924)		$162,089.19
Invested Capital		736,470.52
Add 1917 overpayment (for which claim filed)		339.58
Prorated 1918 income tax		33,294.68
		$770,104.78
Less:		
Original deduction for inadmissibles	$253.43	
Corrected	265.54	12.11
Adjusted invested capital		$770,092.67

Computation of Excess profits and War profits Credits

Net income taxable year	$162,089.19
Net income prewar period	12,818.18
Invested capital taxable year	$770,092.67
Invested capital prewar period	203,501.13
Increase in invested capital for taxable year as compared with that for prewar period	$566,591.54

Excess Profits Credit

8% of invested capital	$61,607.41
Exemption	3,000.00
Total credit	64,607.41

War Profits Credit

Average net income prewar period	$12,818.18
Plus 10% of increase in invested capital	56,659.15
	$69,477.33
10% of invested capital	$77,009.27
Exemption	3,000.00
Total credit	$80,009.27

[fol. 21] Computation of Total Tax (1918) Rates for Government Contracts

Excess Profits Tax

	Income	Tax
Net income for taxable year	$162,089.19	
Less: Excess Profits Credit	64,607.41	
Balance	$97,481.78	
Taxable at 30%	89,411.12	$26,823.34
Taxable at 65%	8,070.66	5,245.93
Total excess profits tax		$32,069.27
Net income for taxable year	$162,089.19	
Less: War Profits Credit	80,009.27	
Taxable at 80%	$82,079.92	$65,663.94
Less excess profits tax		32,069.27
War profits tax		$33,594.67
Total excess profits and war profits tax		65,663.94
Total applicable to Government Contracts (13.55%)		$8,897.46

Computation of Total Tax (1919 Rates)

Excess Profits Tax

Net income for taxable year	$162,089.19	
Less: Excess Profits Credit	64,607.41	
Balance	$97,481.78	
Taxable at 20%	89,411.12	$17,882.22
Taxable at 40%	8,070.66	3,228.26
Total excess profits tax		$21,110.48
Total applicable to income other than Government contracts (86.45%)		18,250.61
Tax at 1918 rates		8,897.46
Total excess profits and war profits tax		$27,147.47

[fol. 22] Income Tax

Net income for taxable year		$162,089.19	
Less:			
Interest on U. S. obligations	$8,567.21		
Excess profits tax	27,147.47		
Exemption	2,000.00		
		37,714.68	
Taxable at 10%		$124,374.51	$12,437.45
Total income and profits taxes			$39,584.92
Previously assessed:			
Acct. No. 403041		$30,328.81	
June 1921 list, Acct. No. 400016		4,558.94	
Jan. 1922 list, Acct. No. 400029		8,231.51	
		$43,119.26	
Less: Overassessment refund (May 13, 1924)		1,936.49	
			41,182.77
Overpayment			$1,597.85

[fol. 23] Exhibit C to Petition

Copy

Treasury Department, Washington

IT:R:CC:3:HRB. Dec. 21, 1925.

Fawcus Machine Company, 1606 First National Bank Bldg., Pittsburgh, Pa.

Sirs: Your claim for refund of $1,597.85, income tax for the year 1919, has been examined.

The claim is based upon the decision of the United States Board of Tax Appeals in the case of the Guaranty Construction Company to the effect that surplus at the beginning of any taxable year may not be reduced in computing invested capital on account of taxes payable within the year upon the income of the preceding taxable year.

You are advised that the Commissioner has not acquiesced in this determination by the United States Board of Tax Appeals.

The claim will, therefore, be rejected and listed on the next schedule to be approved by the Commissioner.

Respectfully, C. R. Nash, Assistant to the Commissioner, by W. T. Sherwood, Head of Division.

[fol. 24] II. General Traverse—Filed July 25, 1927

And now comes the Attorney General, on behalf of the United States, and answering the petition of the plaintiff herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Herman J. Galloway, Assistant Attorney General.

A. H. McC.

III. Submission of Case

On May 6, 1929, this case was submitted on merits without argument by Messrs. Holmes, Brewster & Ivins, for plaintiff, and by Mr. Lisle A. Smith, for defendant.

[fol. 25] IV. **Special Findings of Fact, Conclusion of Law and Memorandum by the Court**—Filed November 4, 1929

This case having been heard by the Court of Claims upon a stipulation of facts signed on behalf of the plaintiff by Holmes, Brewster & Ivins and on behalf of defendant by Assistant Attorney General Herman J. Galloway, the court makes the following

Special Findings of Fact

I

The plaintiff is and at all times hereinafter mentioned was a corporation duly organized and existing under the

laws of the State of Pennsylvania, now having its office and principal place of business at 2818 Smallman Street, Pittsburgh, Pennsylvania.

II

On or about the 15th day of March, 1920, the plaintiff filed with the then duly appointed, qualified, and acting collector of internal revenue for the 23d district of Pennsylvania, on Form 1120, its income and profits tax return for the taxable year ended December 31, 1919, accompanied by its Government contract profits tax return for the same period on Form 1120-S, and subsequent thereto in June, 1921, and in January, 1922, the plaintiff filed in the same manner amended income and profits tax returns and in January, 1922, also filed amended Government contract profits tax returns for the taxable year ended December 31, 1919. The plaintiff paid tax thereon as follows: $30,328.81 in four equal installments on or about the 15th days of March, June, September, and December, 1920, respectively; $4,558.94 on or about September 16, 1921; $8,231.51 on or about January 16, 1922, a total tax payment for the taxable year 1919 of $43,119.26.

III

The Commissioner of Internal Revenue in a letter dated May 13, 1924, determined the liability of the plaintiff for income and profits taxes for the taxable year 1919 to be [fol. 26] $41,182.77. Thereafter, by his certificate No. 673829, the Commissioner of Internal Revenue, pursuant to such determination, certified an overassessment of $1,936.49, which amount was refunded to the plaintiff by the collector of internal revenue with interest amounting to $269.07.

A copy of the letter referred to above is annexed to the petition as Exhibit A and is made a part hereof by reference.

IV

Under the provisions of the revenue act of 1918, more particularly section 326 thereof, the invested capital of a corporation includes cash and property (subject to certain limitations) paid in for stock and paid-in or earned surplus

and undivided profits, not including surplus and undivided profits earned during the year. The total taxes due from plaintiff for the year 1918 amounted to $78,784.95, which were paid in four equal installments on or about the 15th days of March, June, September, and December, 1919. Under the regulations then in force in respect of such taxable year applicable to the relationship between invested capital of one year and taxes of the preceding year the amount of such taxes was included by the Commissioner of Internal Revenue in the invested capital of the plaintiff for the year 1919 until the installments were actually paid. This was accomplished by determining the average deduction for the year and reducing the earned surplus on January 1, 1919, by that amount. The amount of the average deduction was $33,294.68.

V

During the taxable year 1919 at the time each installment of 1918 income and profits taxes of the plaintiff became due and payable, the plaintiff had on hand surplus or undivided profits, earned during the taxable year 1919, more more than sufficient to pay such installment.

VI

The determination of the invested capital of the plaintiff for the taxable year 1919 made by the commissioner further involved the adjustment of surplus as at the beginning of the taxable year 1919 on account of 1917 taxes, as contained in item (e) of schedule 3, and explained in item (e) of schedule 4 of the commissioner's said letter dated May 13, 1924, which shows the correct tax liability for the year 1917 as $94,370.96.

VII

During all of the years involved in this action the books of the plaintiff were kept, and its income and profits tax returns were filed, on the accrual basis.

VIII

On or about December 11, 1925, the plaintiff filed, with the collector of internal revenue for the 23d district of

Pennsylvania for transmission to the Commissioner of In-
[fol. 27] ternal Revenue a claim for refund of excess tax in the amount of $1,597.85.

A copy of said claim is annexed to the petition as Exhibit B and made a part hereof by reference.

IX

On or about December 21, 1925, the Commissioner of Internal Revenue by a letter rejected said claim for refund.

A copy of said letter is annexed to the petition as Exhibit C and made a part hereof by reference.

X

On February 5, 1926, the plaintiff filed in this court a petition setting forth the foregoing facts and seeking judgment against the United States in the sum of $1,597.85, with interest and costs. In February, 1927, the attorney for the defendant moved that said case be dismissed for lack of prosecution. The attorneys for the plaintiff indorsed "No objection" on said motion and it was granted on February 14, 1927. Such dismissal was not upon the merits, which were never presented to the court.

XI

The plaintiff is and always has been the sole owner of the claim herein referred to and has not assigned or transferred the whole or any part thereof or interest therein. It has at all times borne true allegiance to the Government of the United States and has not in any way aided, abetted, or given encouragement to rebellion against the said Government.

Conclusion of Law

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides as a conclusion of law that the plaintiff is not entitled to recover and the petition is therefore dismissed. Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this case, the amount thereof to be ascertained by the clerk and collected by him according to law.

MEMORANDUM

This case falls within the decision of the Supreme Court in the case of United States v. Yale & Towne Mfg. Co., 269 U. S. 422, and the following citations, viz: Nichols v. Sylvester Co., 16 Fed. (2d) 98; Bowers v. Kaufmann & Co., 18 Fed. (2d) 69; Russel Wheel and Foundry Company; 3 B. T. A. 1168. The petition is dismissed. It is so ordered.

[fol. 28] V. JUDGMENT

At a Court of Claims held in the City of Washington on the 4th day of November, A. D., 1929, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and the petition is therefore dismissed.

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this case, the amount thereof to be ascertained by the clerk and collected by him according to law. No printing having been done by the court, no costs are taxed.

[fol. 29] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 34,756. Court of Claims. Term No. 625. Fawcus Machine Company, petitioner, vs. The United States. Petition for writ of certiorari and exhibit thereto. Filed February 4, 1930. File No. 34,756.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 21, 1930

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(3650)